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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 527

THE HANNA MINING COMPANY, ET AL., PETITIONERS

v.

DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL–CIO, AN UNINCORPORATED ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

MEMORANDUM FOR THE UNITED STATES

STATEMENT

By order of the Court, dated December 14, 1964, the Solicitor General was invited to express the views of the United States with respect to this case. The facts are stated in the petition for certiorari and in the opinion of the Supreme Court of Wisconsin (Pet. 4–10, 29–33), and may be summarized as follows:[1]

Petitioner Hanna Mining Company ("Hanna") owns and operates a number of ships which transport cargo on the Great Lakes. Hanna had a collective bargaining agreement with respondent District 2,

[1] References to the Transcript of Record, printed as an appendix to petitioners' brief in the court below, are designated "R."

Marine Engineers Beneficial Association ("MEBA") covering the licensed marine engineers employed aboard Hanna's vessels. The contract terminated in July 1962, and Hanna and MEBA entered into negotiations for a new contract. During these negotiations, a majority of Hanna's engineers informed Hanna that they no longer wished to be represented by MEBA. Thereupon, Hanna declined to negotiate further with MEBA until the question of representation was resolved by a secret ballot election (Pet. 4–5).

On September 12, 1962, MEBA began picketing Hanna's ship, *S.S. Joseph H. Thompson*, which was then being unloaded at Duluth, Minnesota.[2] The picketing resulted in a refusal by dock workers to continue unloading operations, and the ship left Duluth on September 28 with her cargo still unloaded. MEBA also engaged in picketing of Hanna ships at various other ports of the Great Lakes, including Superior, Wisconsin (Pet. 5–6).

The same day the MEBA picketing began, Hanna filed a representation petition with the Regional Director of the National Labor Relations Board, requesting that an election be held among Hanna's engineers to determine whether or not they wished continued rep-

[2] The signs read (Pet. 6):

HANNA MINING UNFAIR
TO
MARINE ENGINEERS
BENEFICIAL ASSOCIATION
REFUSES TO NEGOTIATE
CONTRACT
AFL–CIO
NO DISPUTE WITH ANY
OTHER EMPLOYER
S. S. JOSEPH THOMPSON

resentation by MEBA. The Regional Director dismissed the petition on the ground that the persons in the proposed unit were not "employees" within the meaning of Section 2(3) of the National Labor Relations Act, but were "supervisors" as defined in Section 2(11) (see p. 16, *infra*.). Hanna's request for review was denied by the Board on the same grounds (Pet. 6–7; R. 86–87, 46–47).

On September 15, 1962, Hanna filed charges with the Regional Director, alleging that MEBA had violated Section 8(b)(4)(B) of the Act (p. 17, *infra*) by inducing and encouraging work stoppages among employees of employers other than Hanna at the docks in Duluth. The Regional Director dismissed these charges, and the General Counsel of the Board sustained the dismissal on the ground that the evidence did not show a secondary object proscribed by Section 8(b)(4)(B). The General Counsel pointed out that the picketing conformed to the standards for primary picketing established by the Board in the *Moore Dry Dock* case,[3] and that the oral appeals to neutral employees were likewise primary since they were limited to inducing those employees to cease performing work aboard Hanna's ship.[4] The General Counsel added that MEBA's activity at other sites did not evince an unlawful secondary object, inconsistent with the primary object of the picketing in Duluth (Pet. 6–7; R. 48–51).

On September 27, 1962, Hanna filed with the Regional Director charges alleging that MEBA's

[3] 92 NLRB 547.

[4] See *Pure Oil Co.*, 84 NLRB 315.

picketing had an organizational or recognitional objective and was barred under Section 8(b)(7) of the Act (p. 17, *infra*). The Regional Director refused to issue a complaint, and his ruling was sustained by the General Counsel on the ground that "the supervisory status of the licensed engineers precluded a finding that the Union's picketing and other activity was for an object proscribed by Section 8(b)(7) of the Act * * *" (Pet. 8; R. 55–56).

MEBA continued its picketing of Hanna ships until the close of the Great Lakes navigation season in December 1962. In May 1963, when the Lakes became navigable again and Hanna ships appeared in the harbor at Superior, Wisconsin, MEBA resumed its picketing (Pet. 9).

On June 24, 1963, Hanna filed a complaint in the Circuit Court for Douglas County, Wisconsin, seeking an injunction against the picketing at Superior. The complaint and the supporting affidavits alleged that MEBA was picketing Hanna's vessels at the ore loading docks of the Great Northern Railway Company at Superior, with signs similar to those used in the 1962 picketing; that the objective of the picketing was the same as that of the earlier picketing, *i.e.*, to compel Hanna to recognize MEBA, and to compel its engineers to become members of that union, even though those employees did not desire MEBA as their representative; that such objective was unlawful under Wisconsin law;[5] and that the Board had previously determined that the engineers were supervisors to whom the National Labor Relations Act did not

[5] See *Teamsters* v. *Vogt*, 354 U.S. 284.

apply. It was further alleged that the picketing was causing work stoppages among individuals employed by employers other than Hanna (Pet. 9; R. 68–79, 56–64). The complaint requested an order enjoining MEBA, *inter alia,* from picketing the vessels of Hanna or the docks where they were located, and from seeking to compel Hanna to employ only members of MEBA or to force its employees to become and remain members of MEBA (R. 78). The Circuit Court, on motion of MEBA, dismissed the complaint for lack of jurisdiction over the subject matter, and the Supreme Court of Wisconsin affirmed (Pet. 41–45, 29–40).

The Supreme Court of Wisconsin concluded that MEBA's picketing, as described in the complaint and supporting affidavits, arguably violated Sections 8(b)(4)(B) and (7) of the National Labor Relations Act, and thus, under this Court's decisions in *Garmon*[6] and *Interlake,*[7] State regulation was barred, at least until the Board had determined this issue. Nor was it relevant, in the view of the Wisconsin court, that the General Counsel had declined to issue a complaint with respect to MEBA's picketing; for only a decision by the Board was sufficient to resolve the status of disputed conduct under the NLRA.[8] The

[6] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236.

[7] *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173.

[8] In so holding, the Wisconsin court relied on the following passage from *Garmon*, *supra* (359 U.S. at 245–246):

> To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. * * * [T]he

court also noted that the picketing which was the basis for Hanna's State court suit took place at Superior, Wisconsin in June 1963, while the picketing dealt with by the General Counsel of the Board took place at Duluth, Minnesota, in September 1962 (Pet. 34-40).

DISCUSSION

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245, this Court held that, when "an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." And, in *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173, the Court specifically applied this principle to the picketing activities of MEBA, the labor organization here.* A Board determination of whether activity is prohibited by the NLRA ordi-

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Board may * * * fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. * * *

*However, in *Interlake*, unlike here, there had been no effort to present the underlying activity to the Board or the General Counsel, *before* instituting the State court action.

narily may be obtained by filing an unfair labor practice charge with the General Counsel of the Board. If the General Counsel finds reasonable cause to believe that an unfair labor practice has been committed, he will issue a complaint[10] and the matter will ultimately go before the Board for decision. If, on the other hand, he finds no reason to believe that an unfair labor practice has been committed, he will decline to issue a complaint and the matter will never reach the Board. In the usual case, the General Counsel's refusal to issue a complaint does not "define the nature of the activity with unclouded legal significance" (*Garmon*, 359 U.S. at 246), and hence does not permit the States to step in.

The Act, for example, prohibits peaceful picketing when it is conducted for the secondary objectives proscribed by Section 8(b)(4)(B), and limits picketing, even though it is directed only at the primary employer, when it is conducted for recognitional or organizational purposes (Section 8(b)(7)).[11] In general, peaceful picketing otherwise falls either within the specific protection of Section 7 of the Act or within the area which Congress has designedly left to the free play of economic forces.[12] In these circumstances, it is apparent that, should the General Coun-

[10] See Sections 10(b) and 3(d) of the Act (29 U.S.C. 160(b), 153(d)).

[11] These provisions are set forth pp. 17–18, *infra*. For the distinction between primary and secondary picketing, see *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667; *United Steelworkers* v. *National Labor Relations Board*, 376 U.S. 492.

[12] See *Garner* v. *Teamsters Union*, 346 U.S. 485, 499–500; *Teamsters* v. *Morton*, 377 U.S. 252, 259–260.

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sel refuse to issue a complaint on charges alleging that picketing was being conducted in violation of Section 8(b)(4)(B) or Section 8(b)(7), this would normally not be sufficient to establish that the activity was removed from the preemptive effect of the Act. Such refusal would merely indicate that there was insufficient evidence to bring the picketing within one of the Act's prohibitory bans; it would not negate the possibility that the picketing was affirmatively protected by Section 7 or designedly left free.

The Wisconsin courts, applying these principles, concluded that the Board had not defined "with unclouded legal significance" the nature of MEBA's picketing of the Hanna vessels, and that the State courts were therefore without power to regulate such activity. We submit that, in the special circumstances of this case, the Board definitively has determined that, insofar as MEBA's picketing of the vessels was primary, it is outside the ambit of the NLRA. The Wisconsin courts thus were empowered to enjoin the picketing to that extent.

1. It is clear that efforts to organize persons who are "supervisors," rather than "employees," are not protected by the NLRA. Section 7 of the Act, which protects the right to self-organization, is limited to "employees," and, by the 1947 amendments to the NLRA, Congress removed "supervisors" from the category of "employees".[13] Its purpose in doing so was to "relieve employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line

[13] See Sections 2(3) and 2(11) of the Act, p. 16, *infra*.

of management the anomalous status of employees." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. LMRA (1947) 411; see *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. at 178, n. 5. This is made manifest in Section 14(a) of the Act (p. 18, *infra*), which provides that, although supervisors are free to join unions, "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." Congress having sought to leave employers free from federal, as well as State, compulsion to recognize and bargain with a union representing supervisors, efforts by a union to compel such recognition and bargaining are not protected by the National Labor Relations Act.[14]

It is equally clear that primary picketing for the purpose of forcing an employer to bargain with a labor organization as the representative of supervisory personnel, or forcing supervisory personnel to accept that labor organization as their collective bargaining representative—the alleged objects of MEBA's picketing here—is not prohibited by the NLRA, not even "arguably" so. Section 8(b)(7) (p. 17, *infra*), the provision regulating picketing for organizational or recognitional purposes, explicitly applies only to picketing directed at "employees."

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[14] See *National Labor Relations Board* v. *Budd Mfg. Co.*, 169 F. 2d 571 (C.A. 6), certiorari denied, 335 U.S. 908; *Alabama Marble Co.*, 88 NLRB 1047, 1049, 1074; *Modern Cleaners Co.*, 100 NLRB 37, 38–39; *Jackson Electric Membership Corp.*, 106 NLRB 1019; *Leonard Niederriter Co.*, 130 NLRB 113; cf. *Panaderia Sucesion Alonso*, 87 NLRB 877, 880–883.

Finally, there is nothing in the history or policies of the NLRA which suggests that Congress, although neither protecting nor prohibiting organizational picketing directed at supervisors, intended such picketing to be beyond the reach of the States. Cf. *Teamsters* v. *Morton*, 377 U.S. 252, 259–260. The evil of organizational picketing—*i.e.*, that it tends to coerce the persons involved to join, and the employer to recognize, the picketing union—is precisely the same whether the picketing is directed at supervisory personnel or at employees. Accordingly, the failure of Congress to prohibit such picketing when directed at supervisors can only be explained on the ground that the NLRA does not, as a general matter, deal with organizational activity among supervisors—it does not show that Congress intended to leave the subject unregulated by other means. Nor does Section 14(a) of the Act compel a contrary conclusion. That section prohibits a State from imposing on an employer the duty to recognize a union of supervisors; it does not preclude a State from protecting an employer from union pressure designed to force such recognition. Indeed, to read the latter prohibition into Section 14(a) would defeat its very purpose to insure the freedom of employers not to recognize a union representing supervisors.

2. In this case, there has been a definitive adjudication by the Board that Hanna's engineers were supervisors under the NLRA. In September 1962, when MEBA's picketing first began, Hanna filed a representation petition with the Board's Regional Director requesting that an election be held among its engi-

neers, the Regional Director dismissed the petition on the ground that the engineers were supervisors as defined in Section 2(11) of the Act, and the Board denied Hanna's request for review on the same grounds (pp. 2–3, *supra*).

In light of this authoritative ruling by the Board, it followed (see pp. 8–10, *supra*) that the Act was indifferent to bargaining or organizational efforts on behalf of Hanna's engineers. The Act did not compel Hanna to bargain with a union for those engineers, even if the union represented a majority; nor was picketing of Hanna for the purpose of obtaining recognition as the representative of the engineers subject to regulation under Section 8(b)(7). Accordingly, when Hanna, shortly after its representation petition was denied, filed an 8(b)(7) charge with the General Counsel, he properly dismissed it on the ground that, in view of the Board's determination of supervisory status, Section 8(b)(7) was inapplicable to the picketing (pp. 3–4, *supra*).

In these circumstances, irrespective of what may be the result in other cases, the ruling of the Board on the representation petition coupled with the General Counsel's refusal to issue a complaint on the 8(b)(7) charge have determined "with unclouded legal significance" (*Garmon*, 359 U.S. at 246) that the NLRA neither protects MEBA in, nor prohibits it from, engaging in primary picketing of Hanna's vessels for the purpose of compelling Hanna to recognize it as the representative of its engineers. Therefore, there is no valid justification for barring the State from regulating that picketing, if it so chooses.

The contrary conclusion leads to a result which the court below termed a "paradox" (Pet. 40): MEBA's primary picketing—though neither "arguably" protected nor prohibited by the NLRA, and not designedly left unregulated by Congress—is nevertheless free of State restraint, notwithstanding that the activity is allegedly unlawful under State law. Such an anomalous hiatus in the regulation of MEBA's organizational picketing is not compelled by, nor does it serve in any way to further, the principles underlying the *Garmon* preemption doctrine—*i.e.*, the avoidance of potential interference with the policies of the NLRA.

3. Nor is the State deprived of all jurisdiction to regulate MEBA's picketing because it may have "secondary" as well as "primary" aspects.

The picketing of the Hanna ships at Superior, like most ship picketing, occurred at a common situs, *i.e.*, a location where not only Hanna, but also other employers, were engaged in business. Under the Board's *Moore Dry Dock* criteria,[15] picketing at such a situs is secondary and within Section 8(b)(4)(B) if it is directed at the secondary employers and their employees, but it is primary and outside that section if every reasonable effort has been made to confine the picketing to the primary employer's operations. Since the picketing of the Hanna ships appears to have caused the employees of the other employers on the common situs to stop work, a question arises as to whether this was the result of the picketing directed against Hanna, or the result of a deliberate effort to

[15] 92 NLRB 547, 549.

direct the picketing at the secondary employers."[16] And, insofar as the picketing were secondary, the Board would be able to check it under Section 8(b)(4)(B) even though the ultimate object were to secure recognition on behalf of supervisors, for the protection of that section extends to "any person" engaged in commerce (see p. 17, *infra*). Although the General Counsel of the Board found that the 1962 picketing at Duluth was not secondary (p. 3, *supra*), he had no opportunity to evaluate the 1963 picketing at Superior, which forms the basis for the present suit, because Hanna did not file an 8(b)(4)(B) charge with regard to that picketing. Accordingly, the 1963 picketing "arguably" contained some secondary elements which the Board could reach under 8(b)(4)(B). The court below concluded that this possibility—which seems somewhat remote in view of the apparent similarity of the 1962 and the 1963 picketing—was sufficient to deprive the State courts of all jurisdiction in this case. We submit that the court below erred.

In the usual case of common situs picketing, the policies of the NLRA are furthered by excluding all State regulation, at least until the Board has evaluated the activity. For, not only is the line between secondary and primary activity a delicate one, but, to the extent that the activity is found to be primary, it cannot in any event be regulated by the State, for it

[16] Hanna's complaint in this case alleged that the picketing caused work stoppages on the part of neutral employees, but it is not clear whether these were an incident of the primary picketing against Hanna, or due to more deliberate efforts (R. 76–77).

would be protected by Section 7 or limited by Section 8(b)(7). In the instant case, however, it is clear that MEBA's primary picketing, since it seeks to attain recognition on behalf of supervisors who are not protected by the Act, is activity which the State could regulate irrespective of whether the General Counsel of the Board were to find that the picketing also had secondary aspects which the Board could proscribe under Section 8(b)(4)(B). In short, unlike the usual common situs picketing where both the secondary and primary aspects of the picketing are regulated by the NLRA, the picketing here was a hybrid: insofar as it was directed at Hanna alone, it was outside the regulatory sphere of the Act and subject to control by the State; and insofar as it may have been directed at the other employers on the common situs as well, it was secondary and reachable by the Board under Section 8(b)(4)(B). The State, by an injunction limited to MEBA's primary picketing, could reach the part of the picketing which is undeniably within its jurisdiction without at the same time encroaching upon the Board's jurisdiction over the secondary aspects (if any). The fact that the Board may ultimately proceed against the secondary aspects of the picketing consequently affords no valid justification in this case for denying to the State the power to reach that part of the picketing which is clearly within its regulatory sphere. Cf. *Youngdahl* v. *Rainfair,* 355 U.S. 131, which holds that, while the State could not enjoin all the picketing at the plant of an interstate employer, it was free to enjoin acts and threats of violence emanating from the picket line.

And see *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U.S. 24 (State empowered to enjoin primary picketing of foreign flag ships, for the NLRA does not apply to employees on those ships; since such picketing usually occurs in a common situs situation, it, no less than the picketing here, "arguably" would always have secondary aspects).

CONCLUSION

For the foregoing reasons, we believe that the Supreme Court of Wisconsin erred in holding that the State court lacked jurisdiction to enjoin the picketing in this case insofar as it was directed at the primary employer, Hanna.

Respectfully submitted.

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FEBRUARY 1965.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

SEC. 2.

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical

nature, but requires the use of independent judgment.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * *

SEC. 8(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the

provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employes, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any

other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

* * * * *

SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1948